UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RODNEY BARBER :
:
vs. : C.A. NO.: 05-390-ML
:
VERIZON NEW ENGLAND, INC :

MEMORANDUM OF LAW IN SUPPORT OF
OBJECTION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes the Plaintiff in the above-entitled matter, and hereby objects to Defendant's Motion for Summary Judgment. The grounds for Plaintiff's Objection are set forth as follows.

On or about January 1, 1985, Barber was hired by Verizon. Barber worked out of the Verizon office located in the City of, Providence County of, Providence State of Rhode Island and was employed at Verizon's Rhode Island Equipment Installation Center, located at 234 Washington Street, Providence, RI. as a Central Office equipment Installer. On or about January 1, 1997 Barber was diagnosed with Hepatitis C. Due to this condition Barber was required to undergo chemotherapy. His condition did not respond to said treatment. Without a transplant, Barber has a limited life expectancy.

On or about October 27, 2003, Barber filed for a leave of absence under the guidelines of Metropolitan Insurance, Verizon, and the Family Medical Leave Act. He received approval of his leave on October 27, 2003, until January 11, 2004. See Exhibit 1. On or about January 1, 2004 through January 5, 2004, and while still approved for leave through Verizon, Barber traveled to Las Vegas, Nevada for a wedding. On or about January 15, 2004 Conway had a conversation with Deplitch and during said conversation Conway told Deplitch about Barber traveling to Las Vegas, and he had been administered the code of business conduct for 2004.

On or about January 16, 2004 Barber returned to work at Verizon. On or about Januarry16, 2004, Conway held a meeting with Barber to discuss Barber's attendance. On or about January 16, 2004 Conway called Deplitch to inform her of his conversation with Barber. On or about January 29, 2004 Barber received a letter from Deplitch stating he was terminated from Verizon for traveling to Las Vegas, while on disability leave and without prior permission to travel. See Exhibit 2. Barber was not given a warning, suspension, or any other action, but was instead terminated. Other employees who traveled without permission while on disability leave where not terminated. See Exhibit 3 and 4. Due to his termination, Barber lost: Back wages; Retirement benefits; Compensatory Damages: savings, his home, marriage, medical coverage, medical treatment, medicine, humiliation, and embarrassment.

Barber has complied with administrative requirements under the Rhode Island Fair Employment Practices Act, was issued a Notice of Right to Sue dated June 29, 2005 and has timely commenced suit thereon. Suit was filed on August 18, 2005.

I. DISPUTED FACTS

Plaintiff incorporates by reference his Statement of Disputed Facts and accompanying exhibits.

II. ARGUMENT

A. Standard of Review

Summary judgment is only appropriate when the pleadings and other submissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party opposing a motion for summary judgment must establish the existence of a genuine issue for trial by setting forth specific facts which, if established at trial as true, would entitle him to prevail on his claim. He may not rely on mere allegations to defeat such motion. *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985). "To demonstrate that no genuine issue of material fact exists, the moving party must point out 'an absence of evidence supporting the nonmoving party's case.'" *Daury v. Smith*, 842 F.2d 9, 11 (1st Cir. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

B. Plaintiff Was Disabled

The Americans with Disabilities Act is a federal civil rights statute, enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *42 U.S.C. § 12101*(b)(1). See also *Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 671 (1st Cir. 1995).* In the employment context, the ADA prohibits a "covered entity" (defined as "a person engaged in an industry affecting commerce who has 15 or more employees") from "discriminating against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *42 U.S.C. § 12112*(a).

If a plaintiff lacks direct evidence of discrimination, as in this case, he can prove his case by using the now familiar prima facie case and burden shifting methods that originated in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).* As applied to a motion for summary judgment in an ADA case, the first prong of the *McDonnell Douglas* analysis requires a plaintiff initially to demonstrate a prima facie case of discrimination by showing that: (i) he was disabled within the meaning of the Act; (ii) he is qualified to perform the essential functions of the job with or without reasonable accommodations; and (iii) the employer discharged him in whole or in part because of his disability. *Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 511 (1st Cir. 1996).*

It is not contested in the papers filed by Verizon that Plaintiff was qualified to perform the essential functions of the job and was subject to an adverse employment action. The discussion in this section of Plaintiff's memorandum is whether Plaintiff can present evidence on whether he was disabled within the meaning of the Act.

Under the ADA "disability," with respect to an individual, is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." *42 U.S.C. § 12102*(2). In *Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998)*, the Supreme Court set forth a three-part test for analyzing whether a plaintiff suffers from a disability within the meaning of subsection *12102(2)(A)* of the ADA. The first step is to determine whether the plaintiff has a physical or mental impairment. See *id. at 2202*. Second, the life activity upon which the plaintiff relies is identified, and it is determined whether it constitutes a major life activity under the ADA. *id.* Finally, the Court inquires whether the plaintiff's impairment substantially limits the major life activity previously identified. *id*

1. Plaintiff had an impairment within the meaning of the ADA at the time he was terminated

The EEOC, in regulations promulgated to implement the ADA, defines "physical or mental impairment" as: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, [inter alia]. *29 C.F.R. § 1630.2(h) (1995)*.

There is no dispute that Plaintiff was diagnosed with Hepatitis C before he was terminated on January 29, 2004. Being that Hepatitis C affects the liver, this clearly is a physical impairment. The question before this Honorable Court is whether Plaintiff was substantially limited in a major life activity.

2. Plaintiff was substantially limited in a major life activity within the meaning of the ADA at the time he was terminated

For a physical impairment to rise to the level of a disability under the ADA, a plaintiff must show that it substantially limits him with respect to a major life activity. See *42 U.S.C. § 12102*(2)(A). Major life activities refer to "those activities that are of central importance to daily life." *Toyota Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681, 691, 151 L. Ed. 2d 615 (2002)* (citations omitted).. Examples of major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *29 C.F.R. § 1630.2(i)*. In addition, the ability to reproduce and bear children is also a major life activity. See *Bragdon v. Abbott, 524 U.S. 624, 638, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998); Cruz Carrillo v. AMR Eagle, Inc., 148 F. Supp. 2d 142, 144 (D.P.R. 2001)*. This list is illustrative, and not exhaustive. See *Bragdon, 118 S. Ct. at 2205*. The U.S. Supreme Court has noted that "the plain meaning of the word 'major' denotes comparative importance and suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." Id. In determining whether an activity is a major life activity, a court looks to "whether that activity is a significant one within the contemplation of the ADA, rather than whether that activity is important to a particular plaintiff." *Colwell, 158 F.3d at 642*.

For an impairment to constitute a disability, it must limit a major life activity substantially. See *Toyota Mfg., 122 S. Ct. at 691* (noting that the word "substantially" suggests "considerable" or "to a large degree."). A major life activity is substantially limited if an individual is:

(i) unable to perform a major life activity that the average person in the general population can perform; or

(ii) significantly restricted as to the condition, manner or duration under which he or she can perform a particular major life activity as compared to . . . the general population . . . *29 C.F.R. § 1630.2(j)(1)*.

Whether Plaintiff's physical impairment impacted a major life activity does not benefit his case unless the impact was substantially limiting. In making this determination the court considers several factors, including the nature and severity of the impairment, the duration or expected duration of the impairment, and the actual or expected permanent or long-term impact resulting from the impairment. *29 C.F.R. § 1630.2(j)(2)*; *Toyota Mfg., 122 S. Ct. at 690.*

As the Supreme Court has stated, "[a]n individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person." *Toyota, 534 U.S. at 199*

In the case at hand, Plaintiff testified that his Hepatitis C impacted various major life activities. The first is physical activity. At his deposition, Plaintiff stated that shortly after he was diagnosed with Hepatitis C he was unable to do any sports that he previously did before the diagnosis. This included football and softball. See Exhibit 5, Deposition of Plaintiff, p. 108, l. 12-25; p. 109, l. 1-17

Plaintiff also claimed that his sex life decreased dramatically. When asked if his sex life was affected by the treatment, Plaintiff answered: that it was. He stated that before the ailment he had sex with his wife "at least once every two days, on average". See Exhibit 5, Deposition of Plaintiff, p. 141, l. 17-23. He then testified that after the illness in 2001 or 2002, he suffered from impotence. See Exhibit 5, Deposition of Plaintiff, p. 143, l. 7-25; p. 144. l. 1-24. This was documented in his medical records. See Exhibit 6. Plaintiff was also unable to have any children due to the issue of impotency and the concern of what affect the illness would have on a fetus. Plaintiff testified that he and his wife, Kara Graham (a Verizon employee), were planning on having a baby prior to being diagnosed with Hepatitis C. See Exhibit 5, Deposition of Plaintiff, p. 139, l. 3-17. He further testified that he was told by his Doctor that there could be a risk to the fetus due to the medicine he was taking. See Exhibit 5, Deposition of Plaintiff, p. 140, l. 10-21.

Sexual relations has been determined to be a major life activity. The Ninth Circuit has put forth the reasons why "engaging in sexual relations, just like procreation, is a major life activity" under the ADA. *See McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999).* The Supreme Court has embraced a broad definition of the term "major life activity" and has indicated that it encompasses activities which are private in character. *Bragdon v. Abbott, 524 U.S. 624, 625, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998).* Plaintiff has stated that his ability to engage in sexual relations was ***substantially limited*** at the time the adverse action occurred. In making these definitional determinations it is important to note that no causal connection needs to be made between a particular limitation and an employer's discriminatory response. *Colwell v. Suffolk County Police Dep't, 158 F.3d 635 (2d Cir. 1998).* Therefore, it does not matter whether anyone at Verizon knew anything about Plaintiff's impotence at the time of the termination

In general, unsupported self-serving statements by the plaintiff regarding the severity of a disability are insufficient to preclude summary judgment in an ADA case. However, given the opportunity, Plaintiff would have his former wife, Kara Graham, testify to this issue. See Exhibit 7. The plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." (emphasis added) Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Verizon's motion for summary judgment was brought during the time period during which discovery was to open. In fact, Verizon both sought and was granted a conference with this Honorable Court to prevent Plaintiff from deposing a number of employees of Verizon that Plaintiff believed was crucial to its case, and specifically, for his objection to any motion for summary judgment.

Having the testimony of Ms. Graham corroborating Plaintiff's testimony, it will provide sufficient support for a reasonable jury to find that Plaintiff's illness limits at least his major life activities of sexual functioning and reproducing.

2. *Verizon viewed Plaintiff as disabled within the meaning of the ADA*

Even if this Honorable Court rules that Plaintiff was not substantially limited with respect to a major life activity, the record does or will show that Verizon viewed Plaintiff as disabled within the meaning of the ADA. An employee is "regarded as" disabled within the meaning of the ADA if the employer mistakenly believes that the employee is substantially limited in one or more major life activities, either by an impairment that the employee does not have, or by an impairment that the employee actually does have, but that does not substantially limit a major life activity. *Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521-22, 144 L. Ed. 2d 484, 119 S. Ct. 2133 (1999).* ;Under the EEOC regulations, "an individual who has an impairment that is not substantially limiting (or has no impairment at all) is nevertheless 'disabled' if he is treated by the employer as having an impairment that does substantially limit major life activities." *Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996); 29 C.F.R. § 1630.2(l)(1).* Thus, an individual who is otherwise not disabled may be handicapped by another's "myths, fears and stereotypes" about disabilities. 29 C.F.R. § 1630, app. § 1630.2(l).

Plaintiff asserts that his Hepatitis C constitutes an actual disability under the ADA but argues that Verizon erroneously perceived his condition as substantially impairing the major life activity of working, when in fact it did not. See *29 C.F.R. § 1630.2(i)* (listing "working" as a major life activity under the ADA). Plaintiff first notified Verizon of his Hepatitis C when he discussed it with Sharon Mello, his first line supervisor at Verizon.

See Exhibit 5, Deposition of Plaintiff, p. 94, l. 20-25; p. 95, l. 1-6. In fact, he discussed it in detail due to the fact that Ms. Mello had a husband who was diagnosed with cancer and had taken the same drugs as Plaintiff. See Exhibit 5, Deposition of Plaintiff, p. 96, l. 2-25. In addition, viewing documents provided by Verizon in response to Plaintiff's request for production, Verizon had information had information as to Plaintiff's condition (See Exhibit 8) and the potential risks and discomfort (See Exhibit 9)

Further, Plaintiff has had conversations with other employees of Verizon who have told him that Verizon knew of his illness and viewed him as a liability. His current first line supervisor, David Paolino, told Plaintiff that he had never seen a matter such as this and that being terminated was too severe for punishment (See Exhibit 10) and the business manager of his union, Bill McGowan, told Plaintiff that knows of Joseph Conway speaking with a representative from the insurance company regarding the seriousness of his Hepatitis C (See Exhibit 11). At a minimum, Plaintiff should be able to dispose these two (2) people to obtain this information. As stated previously, the plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." (emphasis added) Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

C. There Is An Issue Of Material Fact As To Whether Plaintiff Was Discharged Because Of His Hepatitis

The standard for granting a motion to dismiss is a rigorous one. A court should not grant a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) (footnote omitted). In determining whether a set of facts could support the claim, "a court must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiff." Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993).

In viewing a motion for summary judgment, once a plaintiff establishes a prima facie case of disability discrimination, the burden then shifts to the defendant to produce sufficient evidence to permit a rational trier of fact to conclude that there is a nondiscriminatory reason for the challenged employment action. *See Dichner v. Liberty Travel, 141 F.3d 24, 30 (1st Cir. 1998).* If the employer then meets its burden of production by bringing forth a legitimate, nondiscriminatory reason for the termination, the matter normally becomes a question of fact *if* the plaintiff has sufficient evidence in the record to find that the employer's asserted justification is false. *Reeves, 120 S. Ct. at 2109.* In the present case, for purposes of this motion, Plaintiff does not dispute that insubordination would be a legitimate, nondiscriminatory reason for termination and that Defendant has put forth evidence supporting that contention. However, Plaintiff has also put forth evidence that the asserted justification is merely a pretext.

In the present case, Plaintiff does not contest that Defendant has put forth such a reason, but he contests the veracity of the reason put forth as there are clearly factual disputes regarding the reasons behind the termination of Plaintiff. The issue becomes whether there is sufficient evidence in the record to allow the trier of fact to find that the employer engaged in intentional discrimination. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).*

1. The conclusions of the arbitration panel has no bearing on the matter before this Honorable Court

After Plaintiff was terminated by Verizon, a grievance was brought by his union as to whether Verizon had "just cause" within the meaning of the Collective Bargaining Agreement to terminate his employment. This hearing was for the sole purpose of deciding whether Verizon had just cause to terminate the Plaintiff. See Exhibit 12. This hearing was not intended, nor was any evidence submitted or heard on whether Verizon discriminated against the Plaintiff in the actions it took in terminating him. Defendant now wants this Honorable Court to use the non-unanimous decision by the arbitration panel that Plaintiff violated company policy and therefore, properly terminated the Plaintiff without any discriminatory intent.

At the arbitration, two (2) of the three (3) panel members determined that the Plaintiff knew or should have known the conditions of the handbook and that the Plaintiff decided to travel to Las Vegas with prior knowledge that he needed to obtain permission from the insurance carrier before he did so. See Exhibit 13. All the panel members did agree that the termination of the Plaintiff was to sever of a penalty and ordered the Plaintiff reinstated.

Verizon now wants this Honorable Court to adopt the panel's decision as it relates to the discrimination charge brought by the Plaintiff. However, Verizon's argument is contrary to established law. The United States Supreme Court has stated: "In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." Alexander v. Gardner-Denver Co., 415 U.S. 36, 49, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974). Arbitration under a collective bargaining agreement does not preclude a Title VII claim based on the same factual circumstances because of the limited expertise of a labor arbitrator. Id. at 53. Such arbitration is based on "the law of the shop, not the law of the land" and may be influenced by the interests of the union pursuing the grievance rather than by the interests of the individual. 415 U.S. at 51-53. The Supreme Court has also found that labor arbitration awards do not preclude federal civil rights suits under 42 U.S.C. § 1983 that are based on the same factual circumstances. McDonald v. West Branch, Michigan, 466 U.S. 284, 292, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984). In McDonald, the Supreme Court held that arbitration decisions are not subject to the mandate of 28 U.S.C. § 1738 because arbitration is not a "judicial proceeding." Id. at 287-88. The Court further held that arbitration does not "provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights" of the Plaintiff. Id. at 290.

The Court went on to state four (4) reasons in support of its opinion. First, an arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land." Alexander v. Gardner-Denver Co., 415 U.S. 36,] 57 [(1974)]. An arbitrator may not, therefore, have the expertise required to resolve the complex legal questions that arise in constitutional actions. Second, because an arbitrator's authority derives solely from the contract, an arbitrator may not have the authority to enforce constitutional issue. Third, when, as is usually the case, the union has exclusive control over the "manner and extent to which an individual grievance is presented," Gardner-Denver, supra, at 58, n.19, there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee. Thus, were an arbitration award accorded preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously. Finally, arbitral factfinding is generally not equivalent to judicial factfinding. Id., 466 U.S. at 290-91 (footnotes omitted).

The Third Circuit has held that judicial review of a collective bargaining agreement arbitration decision can have collateral estoppel ("issue preclusion") effect on a later Title VII federal case. Rider v. Pennsylvania, 850 F.2d 982 (3d Cir.), cert. denied, 488 U.S. 993, 102 L. Ed. 2d 582, 109 S. Ct. 556 (1988). However, that case can be distinguished from the present situation because the arbitrator made decisions regarding the merits of the collective bargaining agreement rights and not his discrimination claims. The Third Circuit stated that it might have been persuaded that court review was not a decision on the merits if the state court "had limited its review solely to whether the arbitrator had properly applied the principles of contract interpretation. Id. at 992.

When the employer has prevailed at arbitration, as is the case in the case at hand, there, of course, can be no duplicative recovery. "But even in cases where the employee has first prevailed, judicial relief can be structured to avoid such windfall gains." Alexander v. Gardner-Denver, 415 U.S. at 51 n.14; see also Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969) (holding that trial court erred in not allowing Title VII claim to be pursued both in court and through arbitration as long as relief was not duplicated). In Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1553-54 (10th Cir. 1988), the court decided that an arbitrator's award for the plaintiff did not foreclose his federal ADEA claim, but that his recovery in federal court would be offset by the award received previously.

2. The termination of another employee who traveled to the same wedding as Plaintiff while said employee was on disability leave has no bearing on the matter before this Honorable Court.

Verizon attempts to argue that because another co-worker of Plaintiff, who attended the same wedding as Plaintiff, was terminated while on disability leave because she did not receive prior permission to travel, that this proves no discriminatory intent on the part of Verizon. However, this argument in flawed in many ways. First, there is no information on the reasons this other employee was terminated. Second, said co-worker also grieved her termination. Third, this could show that both the co-worker and the Plaintiff were subject to discriminatory treatment. Last, it is not important as to what occurred at the same time of Plaintiff's termination, but what occurred prior to Plaintiff's termination.

The issue is whether Verizon treated other employees differently than Plaintiff before Plaintiff's termination.

Verizon did state that Plaintiff testified regarding other employees who traveled without permission while out on sick leave, but that he did not have specific names and was told this information from the president of the Union. It further stated that this information is hearsay and should not be allowed. However, when a court rules on a motion for summary judgment, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

In addition, if the testimony of Plaintiff is true, than it is imperative to depose the president of the Union before Summary Judgment may be granted. The plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." (emphasis added) Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Verizon's motion for summary judgment was brought during the time period during which discovery was to open. In fact, Verizon brought sought and was granted a conference with this Honorable Court to prevent Plaintiff from deposing a number of employees of Verizon that Plaintiff believed was crucial to its case, and specifically, for his objection to any motion for summary judgment.

3. Plaintiff has evidence to support his contention that Verizon acted with discriminatory intent.

Plaintiff has significant evidence to prove discriminatory intent by Verizon. Verizon states in its memorandum that it had a valid business decision for termination of Plaintiff and therefore, that ends the case. However, once a valid business decision for termination of Plaintiff is shown, Plaintiff then has the burden of proving that the valid business decision for termination of Plaintiff was a pretext for said termination. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).*

At this time, Plaintiff should not be forced to provide his strategy for proving the discrimination. Plaintiff will, however, show that there are material facts in dispute. "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

The following are examples of material facts that are in dispute. At the arbitration hearing Joseph Conway, Plaintiff's second line supervisor and an employee at Verizon for over 17 years, stated Plaintiff was terminated for not obtaining permission before traveling while on disability. See Exhibit 14 for the section of the Disability Plain in question. This is the only document at Verizon that states a rule regarding obtaining permission. See Exhibit 15, Arbitration Hearing Transcript, p. 71, l.10-22. When asked what ":otherwise, no benefits shall be paid for such period of absence" in said section means, Mr. Conway stated: "I'm not 100 percent sure what that phrase means. I could make assumptions." See Exhibit 15, Arbitration Hearing Transcript, p. 71, l.4-5. If Mr. Conway does not know the plain meaning of Verizon rules and procedure, how would Plaintiff be expected to know the plain meaning of Verizon rules and procedure. Mr. Conway further stated that there is no document at Verizon that states an employee would be disciplined if permission is not granted. See Exhibit 15, Arbitration Hearing Transcript, p. 72, l.3-7. However, Plaintiff suffered the most extreme discipline, termination, which clearly is different than "otherwise, no benefits shall be paid for such period of absence". The fact that Plaintiff was terminated rather than not paid benefits for the days in question can show that his termination was not based on a legitimate business decision. It thus becomes a disputed fact that should be left for a jury to decide. In fact, when Plaintiff was reinstated, Mr. Conway attempted to have Plaintiff admit he was unable to do his job. At Plaintiffs deposition the following questions and answers occurred:

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Q. And you feel Joe has discriminated against
you?
A. Yes.
Q. Why?
A. Just recently he tried to get me to say
I couldn't do my job because of my illness
because of the sleep-wake cycle. Part of
my job is to work some nights to power
equipment. I worked like four nights and
there was one more night to go and I could
not do it. And I was ill from lack of
sleep. I asked my first level supervisor,
which is a common thing, look, I will come
back on the day shift, can you send
somebody else, I can't make it for the
night shift. She said, okay. The next day

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she called and said, that is part of your
job, you have to work nights, and Joe wants
to talk to you about it. So Joe called for
me and I asked if I needed a union
representative. He said no, it is not a
disciplinary action. You don't need a
union representative. I said, because of
what is going on, I would like to have my
attorney present or someone. He said no, I
don't deal with attorneys. It is not
disciplinary. And I am telling you you
have to be here at seven in the morning.
So I called my union rep. And my union rep

showed up. But he said that it is not going to be disciplinary and he had something else to do and not to worry about it and go in to see what he has to say. I went in and he told me I have to work nights. I say I understand that, but I have a problem working extended nights. So you are telling me you cannot do your job. I said, Joe, I am not telling you that. I said, look, I will go see my doctor and see what he says about it. And the following day I got a call and said I was to report

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to a job and it was going to be 30 days of nights. I said, come on. We have just been discussing this. I said, okay, I went to the doctor's office and I actually had an appointment. And I went to explain to him what was going on. He wrote a letter. And the letter stated what he was treating me for and that it does affect my sleep-wake and please consider especially during a shift change. I gave him that letter. Again, we had another meeting again. So you are telling me you cannot do your job. No, on a regular basis I can work two or three nights, which is normal. I can do the job. When it gets to the extended nights, I have a problem. Please consider that. And then he told me he would get back to me on that and that was the end of that.
Q. When did all of this happen?
A. Probably about the third month or fourth month I was back to work.
Q. So this was sometime in 2005?
A. Yes.

This shows a discriminatory intent by Mr. Conway.

Further, Lorna Deplitch also testified at the arbitration hearing. She testified that she was determined to reduce people taking sick time. See Exhibit 15, Arbitration Hearing Transcript, p. 113, l.21-25; p. 114, l. 1-25; p. 115, l. 1-2. This is a disputed fact that may show a discriminatory intent by Ms. Deplitch of employees who have or may use sick time. If this is the case, which we believe is so, she had a predetermination of terminating Verizon employees who are continuously sick. When asked to explain the rule, she testified it states that employees are not to misrepresent their health status. See Exhibit 15, Arbitration Hearing Transcript, p. 117, l. 8-25. However, this is not what the rule states, it is only her interpretation of the rule. If this what Verizon expected, then it should have been stated in the rule. She went on to testify that the purpose of the rule is to make sure that the employee will not have a more difficult time or negative impact on their recover. See Exhibit 15, Arbitration Hearing Transcript, p. 118, l. 1-75. However, later at the hearing she testified that she did no determine whether Plaintiff's trip to Las Vegas had a more difficult time or negative impact on his recover. See Exhibit 15, Arbitration Hearing Transcript, p. 159, l. 24; p. 160, l. 1-24, p. 161, l. 1-3. She did not look at any other of Plaintiff's prior work or discipline history. See Exhibit 15, Arbitration Hearing Transcript, p. 136, l. 21-24; p. 137, l. 1-21. She never met with Plaintiff to discuss his trip. See Exhibit 15, Arbitration Hearing Transcript, p. 140, l. 10-13.

When asked whether other employees of Verizon have been terminated, Ms. Deplitch stated yes. However, she could not name any other employee even though she had worked for Verizon for over 26 years. See Exhibit 15, Arbitration Hearing Transcript, p. 125, l. 13-24; p. 131, l. 8-24, p. 132, l. 1-24; p. 136, l. 4-13. As with Mr. Conway, Ms. Deplitch also was unable to provide specifics as to what the approval policy meant. See Exhibit 15, Arbitration Hearing Transcript, p. 153, l. 11-24; p. 154, l. 1-24, p. 155, l. 1-24; p. 158, l. 21-20.

Plaintiff was terminated for being in Las Vegas during two (2) work days. There is no rules as to any disciplinary ramifications other than the language in the policy that states "otherwise, no benefits shall be paid for such period of absence". There is a disputed fact as to whether Plaintiff was terminated for traveling without approval or whether that was used as a pretext to terminate him. *McDonnell Douglas, 411 U.S. at 805*). These are facts that are necessary for a jury to decide. As the First Circuit stated in *Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000)*, the United States Supreme Court in *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* clarified that "'the falsity of the employer's explanation' may permit the jury to infer a discriminatory motive but does not compel such a finding." At the summary judgment stage, all the plaintiff must do is produce evidence "'to create a genuine issue of fact with respect to two points: whether the employer's articulated reason for its adverse action was a pretext and whether the real reason was [disability] discrimination.'" *Quinones v. Buick, 436 F.3d 284, 290 (1st Cir. 2006)* (quoting *Thomas, 183 F.3d at 62*). The First Circuit's repeated emphasis that the third stage determination is fact based combined with the obligation to view the facts in a light most favorable to the nonmoving party reinforces why this Court must be cautious in granting summary judgment. *Hodgens v. General Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998)*. This caution is compounded by the recognition that it is rare an employee can point to direct evidence of improper employer motivation. *Thomas, 183 F.3d at 58 n.12* ("'[S]moking gun' evidence is 'rarely found in today's sophisticated employment world.'" (quoting *Hodgens, 144 F.3d at 171 n.8*)).

Finally, it is imperative for Plaintiff to depose certain employees of Verizon before Summary Judgment may be granted. This would include the following: the business manager of the Union. His testimony would show that Plaintiff was treated differently than nondisabled employees (see Exhibit 5, deposition of Plaintiff, p., 126, l. 8-25; p. 127, l. 1-25; p.128, l. 1-22; and Exhibit 11); Sandra Hurt (see Exhibit 4), the coworker who traveled to Las Vegas at the same time as Plaintiff; any employees who are named by the president of the Union as stated above; and John Welling, a representative of Met Life who was the insurance carrier at the time of Plaintiff's termination, who was involved in the discussions regarding Plaintiff's lack of notice.

As argued previously, the plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." (emphasis added) Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Verizon's motion for summary judgment was brought during the time period during which discovery was to open. In fact, Verizon both sought and was granted a conference with this Honorable Court to prevent Plaintiff from deposing a number of employees of Verizon that Plaintiff believed was crucial to its case, and specifically, for his objection to any motion for summary judgment.

III. CONCLUSION

For the reasons as stated above, the Plaintiffs respectfully request that the Defendants motion for summary judgment be denied on all counts.

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CERTIFICATION

I hereby certify that on the 19th day of September, 2006 I emailed a true copy of the within to Attorney Raymond Ripple, Edwards & Angell, LLP, 2800 Financial Plaza, Providence RI 02903, and Attorney Timothy P. Van Dyck, Edwards & Angell, LLP , 101 Federal Street, Boston, MA 02110.